IN THE

Supreme Court of the United States

October Term, 1973
No. 73-954

STANDARD OIL COMPANY OF CALIFORNIA;
CHEVRON ASPHALT COMPANY; SHELL OIL COMPANY;
UNION OIL COMPANY; ARIZONA REFINING CO.;
EDGINGTON OIL COMPANY; SAHUARO OIL COMPANY;
DOUGLAS OIL CO. OF CALIFORNIA;
ATLANTIC RICHFIELD CO.; RICHFIELD OIL CORPORATION;
GULF OIL CORP.; WILSHIRE OIL CO. OF CALIFORNIA;
INDUSTRIAL ASPHALT, INC.; and
AMERICAN PETROFINA, INCORPORATED,
Petitioners,

v.

STATES OF ALASKA, ARIZONA, CALIFORNIA, OREGON,
WASHINGTON, et al.,
Respondents.

BRIEF OF RESPONDENTS STATE OF ALASKA AND STATE OF WASHINGTON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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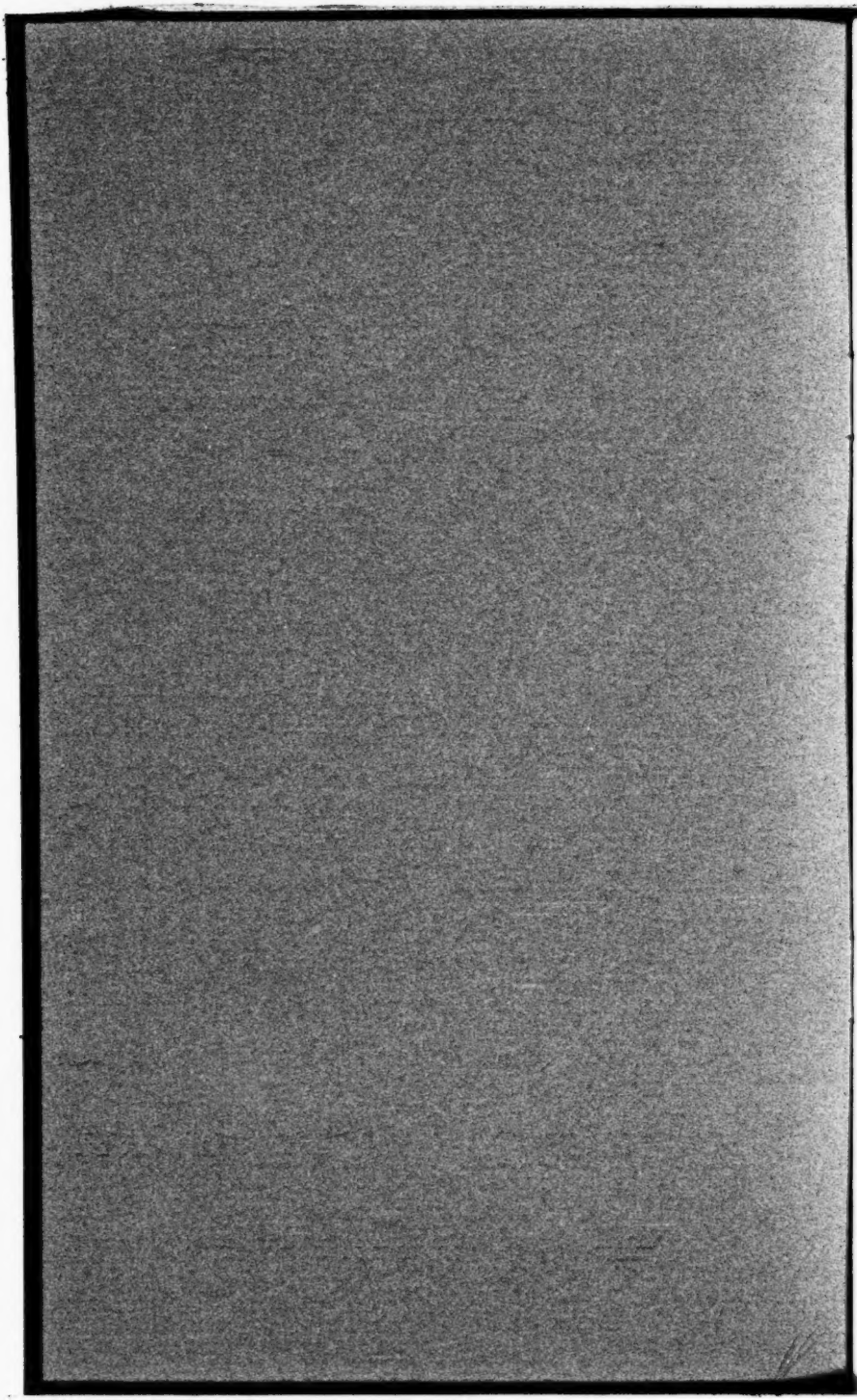

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WASHINGTON, et al.,
Respondents.

BRIEF OF RESPONDENTS STATE OF ALASKA AND STATE OF WASHINGTON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTIONS PRESENTED

The initial question presented is whether the respondent states and public entities, who indirectly purchased an assumedly price-fixed product through contractors, and who are assumed to be able to show that at least part of the illegal overcharge was passed on to them, are precluded as a matter of law from recovering such damages as they ultimately might be able to prove. The corollary questions are whether the holding of the court below to the

effect that the respondents may recover for such damages as they ultimately might be able to prove is in accord with the decision of this Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), or whether such purchases are within a recognized "exception" to the *Hanover* doctrine.

STATEMENT OF THE CASE

Respondents instituted these actions for damages and injunctive relief under §§1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and §§4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26. Respondents allege that petitioners, suppliers of asphalt, illegally raised and stabilized the price of liquid asphalt, which is used in the construction of public roads, through a conspiracy to fix prices, to submit rigged and collusive bids, to allocate and stabilize the relevant market, and otherwise to eliminate competition, and that as a result respondents paid more for projects using asphalt than they would have paid but for the petitioners' unlawful acts. The petitioners moved for a partial summary judgment in the District Court, and for the purposes of that summary judgment the aforesaid allegations must be assumed to be true.

The District Court held in substance that respondents, who indirectly purchased an assumedly price-fixed product through contractors, and who were assumed to be able to show that at least part of the illegal overcharge was passed on to them, were precluded as a matter of law from recovering such damages as they ultimately might be able to prove. The District Court relied for its decision upon *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). *In re Coordinated Pretrial Proceedings*

in Western Liquid Asphalt Cases, (N.D. Cal. 1972), 350 F. Supp. 1369.

The United States Court of Appeals for the Ninth Circuit allowed an interlocutory appeal under 28 U.S.C. §1292(b), from the order of the District Court granting partial summary judgment to the petitioners. On October 3, 1973, the Court of Appeals entered an order (not yet reported) reversing the decision of the District Court. The opinions and orders of the courts below are printed as Appendices A and B to the Petition for a Writ of Certiorari before this Court.

STATEMENT OF FACTS

The facts before the courts below were not seriously in dispute. The petitioners are manufacturers of asphalt, among other things. The petitioners operate a number of refineries, and blending or storage facilities used in connection with the production and sale of asphalt, in various locations along the West Coast of the United States (R. 15731).

The respondents are a number of public entities who are large users of asphalt in connection with the construction and maintenance of public roads. The respondents acquire asphalt in two basic ways. Some of respondents' purchases of liquid asphalt are made directly from the petitioners. In those instances, the liquid asphalt alone was obtained for the application by respondents in road maintenance work. Such direct purchases were not involved in the appeal to the court below.

The respondents acquired the great bulk of the asphalt they used through the award and performance of road con-

struction or maintenance contracts (R. 18029). In those instances, contractors obtained bids from asphalt suppliers, then computed their own, overall bid. The respondents then awarded particular projects to the lowest bidder among responsible contractors. The respondents allege that illegal overcharges by the petitioners resulted in unlawfully high prices to them, for more than three million tons of asphalt purchased in some 37,000 construction and road maintenance contracts (R. 9556-9922).

The Petition before this Court relates to the rights of respondents to claim damages in connection with their acquisition of asphalt through road construction or maintenance contracts ("indirect" purchases). Petitioners have conceded respondents' rights to claim damages in connection with their direct purchases (R. 15900-901). To its ruling denying the respondents' right to recover for damages resulting from "indirect" purchases, the District Court allowed a single exception: The order denying recovery would not apply to such indirect purchases of asphalt as were made pursuant to a contract wherein the respondents "agreed to pay the contractor's cost, whatsoever they may be," plus a fixed percentage (Appendix B, p. 23). No such contract has been entered into by any of the respondents to these actions.

Evidence, not disputed in substance by petitioners, reflects that the usual bidding process on construction or road maintenance contracts involves certain common steps. The contractor totals suppliers' sub-bids, adds an amount for his services, including labor and other overhead, and an amount for profit. The total amount to be bid is then spread over the bid items in the proposal. As between the bids

submitted by various contractors, the methods employed to spread their respective totals will vary, so that the item amounts bid will vary. What is unvarying, however, and common to all bids, is that all contractors include their cost of materials, including asphalt, in their bid.

The overall bid, including allocations to each supply item, is then submitted in competition for the particular project. A contractor is not interested in the level of the price charged by suppliers, so long as he receives at least as low a rate as his competitors (R. 16785-91; 16,793-801; 16,823-25).

Occasionally a contractor will use a paving subcontractor, in which case the subcontractor prepares his sub-bid in the same general manner as do contractors. In any case, sub-bids from suppliers and subcontractors are regarded as firm (R. 16789).

Petitioners also monitor schedules of future road projects, and from time to time offer quotations to contractors, by which they offer to supply materials such as asphalt at a specific price for a particular project only. Also, petitioners manufacture asphalt to comply with specifications published by the governmental bodies, and so certify to the contractors (R. 16506-507).

Most of the contractors who purchased from petitioners and resold to respondents have not come forward to challenge these alleged violations. Only one contractor in California, and three in Oregon, have sued petitioners—a very small percentage of those involved. No contractors have sued in the states of Arizona, Alaska and Washington. It is most likely that the four-year statute of limitations, 15

U.S.C. §15(b), has run on those who have not sued. The court below commented that it was understandable that contractors might not sue, in view of (1) their alleged dependence upon petitioners for their supply of asphalt, (2) the possibility that they earned a percentage profit on the overcharges, and (3) the control and interdependence alleged between petitioners and the contractors. Thus, if the present respondents could establish antitrust violations but are precluded from recovering, no one else would sue, and petitioners would retain their assumedly illegal profits (App. A, p. 11).

REASONS FOR DENYING THE WRIT

The decision of the court below, in holding that the respondents, who indirectly purchased an assumedly price-fixed product through contractors, and who are assumed to be able to show that at least part of the illegal overcharge was passed on to them, may recover such damages as they ultimately might be able to prove, is in accordance with the decision of this Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

ARGUMENT

1. The Decision of the Court Below Is in Accord With This Court's Ruling in *Hanover Shoe*

The federal courts have long recognized the standing of public agencies and other indirect purchasers to sue under §4 of the Clayton Act and to recover damages for antitrust violation. Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

"Any person who shall be injured in his business

> or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

This statute squarely covers overcharges caused by the illegal price-fixing in this case. The statute makes no distinction between damages suffered by direct or indirect purchases. If "any person" suffers injury in the form of higher prices as a consequence of antitrust violations, he may sue the wrongdoers for treble damages.

The district court below dismissed all claims arising from indirect purchases of asphalt on the ground that plaintiffs lack standing to sue as a mattter of law. In so ruling, the district courts said, 350 F. Supp. at 370-71, that it would rule for the respondents, were its decision not controlled by *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). The decision of the district court was reversed by the United States Court of Appeals for the Ninth Circuit.

Prior to the decision in *Hanover Shoe*, the federal courts had consistently held that indirect purchasers could, by way of offense, use the passing-on doctrine in suits to recover damages resulting from violations of the antitrust laws. *Armco Steel Corporation v. State of North Dakota*, 376 F.2d 206 (8th Cir. 1967); *State of Washington v. American Pipe & Construction Co.*, 274 F. Supp. 961 (W.D. Wash. 1967); *State of Washington v. General Electric Co.*, 246 F. Supp. 960 (W.D. Wash. 1965); *State of Missouri v. Stupp Brothers Bridge & Iron Co.*, 248 F. Supp. 169 (W.D. Mo. 1965); see also, *Karseal Corporation v. Richfield Oil Co.*, 221 F.2d 358 (9th Cir. 1955); *Ohio*

Valley Electric Corp. v. General Electric Co., 244 F. Supp. 914, 951 (S.D. N.Y. 1965).

State of Missouri v. Stupp Brothers Bridge & Iron Co., supra, and *Armco Steel Corporation v. State of North Dakota, supra*, each involved allegations that certain structural steel manufacturers had conspired to rig bids and allocate territories in violation of the Sherman Act. There, the plaintiff states urged that the illegal overcharge had been passed on to them by general contractors who had incorporated the manufacturers' steel price quotations in their bid computations on public projects. The defendants asserted that the court should not permit proof of such damage, because the states were indirect purchasers of the steel. In both cases, the court held that the states had demonstrated injury in the amount of the overcharge when they proved that the overcharge on structural steel was included as a component of the general contractors' bids.

The same situation existed in *State of Washington v. American Pipe & Construction Co., supra*. There, the defendant pipe manufacturers moved to dismiss, pointing out that the pipe was purchased through contractors, and asserting that dismissal was required in order to protect the defendants from double liability for the same overcharge. The court denied defendants' motion, relying on the express language of §4 of the Clayton Act. In response to the argument that double liability might result, the court stated:

> "Defendants' argument does nothing more than present the court with a hypothetical question concerning the allocation of provable injury, not with that of the standing necessary to maintain a cause of action."

These principles developed at the same time that courts

were holding that defendants could not assert the pass-on defense to escape liability to direct purchasers. For instance, Judge George Boldt held in *State of Washington v. General Electric Co., supra,* that the court was unwilling to deny the plaintiff its right to sue merely because it purchased the equipment in question through a third party rather than directly from the manufacturer. Just a year earlier, Judge Boldt rejected the "passing-on defense" as a device urged by defendants to defeat damage claims for price-fixing in *Public Utility District No. 1 of Chelan County, Washington v. General Electric Co.,* 230 F. Supp. 744 (W.D. Wash. 1964).

Further, at the time that *Hanover* was decided, it was well settled that standing to sue in an antitrust action did not turn on the relationship of the claimant to the price-fixer. *Karseal Corp. v. Richfield Oil Corp.,* 221 F.2d 358 (9th Cir. 1955); *South Carolina Council of Milk Producers, Inc. v. Newton,* 360 F.2d 414 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966). In *South Carolina Council of Milk Producers,* the court stated:

> "Section 4 does not in its terms limit relief to persons in a direct contractual or competitive status with the persons whose conduct allegedly violates the proscription of the Sherman Act . . . [The] cause of action is not dependent upon a relationship, contractual or otherwise, between the claimant and the offender, so long as the injury is a proximate result of the misdoing."

This Court, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948), has expressly stated:

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . The Act is comprehensive in its terms and cov-

> erage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."

Such was the state of the law at the time that this Court rendered its decision in *Hanover Shoe, supra.* The holding in that case did not change the existing law that allowed recovery of antitrust damages by indirect purchasers. *Hanover Shoe* simply concerned itself with the proper scope of the "passing-on defense", not with the question of whether indirect purchasers may bring suit to prove that they suffered injury by having to pay inflated prices as a result of antitrust violations.

As stated above, the contemporaneous decision of the federal courts, at the time of the opinion in *Hanover,* illustrate a sharp awareness that the use of the "passing-on defense" and the standing of indirect purchasers under the Clayton Act are completely different issues. A distinction must be drawn between the defensive use of "passing-on" by defendants seeking to evade liability and the offensive use of "passing-on" by indirect purchasers claiming damages from antitrust violations.

In a recent decision analyzing the distinction between "offensive" and "defensive" use of the passing-on doctrine in the light of *Hanover Shoe,* Judge Bernard Decker observed that the *Hanover* decision neither explicitly nor implicitly created a general rule of "privity" for standing to sue in a private antiturst action. *Boshes v. General Motors Corp.,* 1973 CCH Trade Cases §§74, 483 (N.D. Ill. 1973) Therein, the court stressed that the Supreme Court

> "nowhere specifically states that Hanover Shoe had standing *because* it was in 'privity' with United Shoe or that privity is a requirement of standing in private

> antitrust cases. In fact, this court has searched in vain for any discussion of the question of standing in the *Hanover Shoe* opinion. If the Court there had intended to establish such a rule, it clearly would have said something about the recent and substantial body of authority which had reached a contrary conclusion and permitted suits under §4 of the Clayton Act by those not in 'privity' with the alleged antitrust violator. See, *e.g.*, . . . *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955) . . . *State of Washington v. General Electric Co.*, 246 F.Supp. 960 (W.D. Wash. 1965)."

Later decisions of this Court refute the contention that it intended, by its silence in *Hanover Shoe*, to establish a rigid doctrine that only a purchaser in privity of contract with the price-fixing conspirators may seek legal redress for damages. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970); and *Barlow v. Collins*, 395 U.S. 159, 164 (1970). In the price discrimination context, this Court has stressed that a plaintiff may recover damages "regardless of the level in the chain of distribution on which the injury occurs . . . if there is sufficient evidence in the record to support an inference of causation, the conclusion as to what the evidence proves is for the jury." *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969). One Court of Appeals has construed the decision of this Court in *Hawaii v. Standard Oil Co., supra*, as authority supporting class actions against drug manufacturers by states representing individuals who purchased antibiotic drugs from retail stores. *Illinois v. Bristol-Myers Co.*, 1972 CCH Trade Cases §74,262, at page 93, 252 (D.C. Cir. 1972).

The need to encourage and strengthen private enforcement of antitrust laws underlies the Court's decision in

Hanover Shoe. Speaking of the ultimate consumers, who were retail purchasers of shoes, this Court, in *Hanover*, noted that each would have

> "... only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." *Id.* at 494.

This Court has repeatedly sought to implement the Congressional policy that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). See also *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 336 (1971); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968) (refusal to recognize *in pari delicto* as a bar to an antitrust suit); *Georgia v. Evans*, 316 U.S. 159 (1942) (state held to be a "person" within the meaning of Clayton Act).

In *Radovich v. National Football League*, 352 U.S. 445, 454 (1957), this Court cautioned that courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws."

In *West Virginia v. Chas. Pfizer & Co.*, 324 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079, 1087 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) the Second Circuit held that the rejection of the "passing-on defense" in *Hanover Shoe* was perfectly consistent with the recovery of damages by indirect purchasers, in view of the philosophy of

"result orientation" in favor of private antitrust actions which pervades the court decisions. In that action, a settlement offer was made by the defendants, and approved by the district court, providing for refunds of overcharges to all purchasers in the chain of distribution of certain broad spectrum antibiotic drugs. Certain retail and wholesale druggists opposed the allocation of any money to ultimate consumers on the grounds that *Hanover Shoe* deprived indirect purchasers of legal standing to recover their damages.

The Second Circuit affirmed the settlement approval and easily reconciled recovery of overcharges by indirect purchasers with *Hanover Shoe* in the following language:

> "First, the passing-on doctrine is not here being used as a defense to permit the defendants to escape liability, but rather as an attempt to award damages, insofar as is possible, to those who ultimately paid higher prices as a result of the collusive pricing, and to avoid giving a windfall gain to those who rather clearly were not injured. Secondly, to permit the use of the doctrine in the present circumstances will not act to limit or frustrate private treble-damage claims, but will, if anything, do the opposite." (440 F.2d 1088)

In this action, if the respondents are not allowed to recover for such damages as they may ultimately be able to prove, no one else will be able to sue, and the petitioners will retain their assumedly illegal profits. The record establishes that the contractors who purchased from the petitioners and resold to the respondents have not come forward to challenge these alleged violations. As noted by the Circuit Court below (Appendix A, page 10-11):

> "Counsel at oral argument pointed out that only one contractor in California, and three in Oregon, have sued appellants — a very small percentage of those in-

> volved. *No contractors have sued in the states of Arizona, Alaska, and Washington.* It is most likely that the four-year statute of limitations, 15 U.S.C. §15b, has run on those who have not sued. It is understandable that contractors might not sue, in view of (1) their alleged dependence upon appellees for their supply of asphalt, (2) the possibility that they earned a percentage profit on the overcharges, and (3) the control and interdependence alleged between appellees and the contractors. Thus if the present appellants could establish antitrust violations but were precluded from recovering, no one else would sue, and appellees would retain their assumedly illegal profits." (Emphasis supplied)

Petitioners argue that if the respondents are permitted to recover, the petitioners will be subjected to the danger of double recovery, since the contractors will also have a claim. Such an argument ignores the facts that petitioners did not make their motion until nearly four years following the filing of the various claims by the respondent public agencies; that no contractor has sued these petitioners in Alaska and Washington and that, in all probabilities, none will or can now sue. Further, there is no reason why appropriate means cannot be found to properly apportion such damages as may ultimately be assessed, should there ever arise a need to do so.

This Court's purpose, in *Hanover Shoe*, was to preserve the private antitrust action and to promote compensation to those injured. Under the facts of that case, recognizing the difficulty of showing whether the plaintiff shoe manufacturer's pricing decisions for shoes reflected the illegal overcharge, the Court ruled that the cause of action rested with the shoe manufacturer who had leased the machinery which was the subject of the violation, rather than with the individual purchasers of a single pair of shoes. On the

other hand, this Court recognized:

> " . . . that there may be situations — for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged — where the considerations requiring that the passing-on defense not be permitted in this case would not be present." *Id.* at 494.

The Circuit court recognized that *Hanover* was not meant to deny recovery in cases in which the passing-on of the illegal overcharge might be more readily demonstrable. The instant action is such a case. Based upon the undisputed facts which form the basis for the motion for summary judgment below, the District Court and the Circuit Court assumed, and properly so, that the respondents in these actions could show that the illegal overcharge had been passed on to them.

2. The Third Circuit Decision in *Mangano*

The petitioners argue that the decision of the Court below is in conflict with the decision of the Court of Appeals for the Third Circuit in *Mangano v. American Radiator & Standard San. Corp.*, (E.D. Pa. 1970), 50 F.R.D. 13, aff'd, 438 F.2d 1187, 1188 (3rd Cir. 1971) (per curiam). In *Mangano*, the Circuit Court did affirm a dismissal against the ultimate purchasers for failure to prove that the alleged overcharge was a "*causa sine qua non* of any payment any of them had to make." However, the motions to dismiss in the four related actions which were considered in *Mangano* were made on the basis of the plaintiff's failure to file answers to interrogatories.

> "Answers were required by orders to which the plaintiffs had consented. Time for answering had been extended. The district court indicated that, under the circumstances present here, the actions merited dis-

missal pursuant to Fed. R. Civ. P. 37(b) (2) (iii) and 37(d) for failure to make responsive, and in some instances any, answers to proper interrogatories. But, in all but the home builders' case (where the defendants had not made an alternative argument), the court also invoked the sanction of Rule 37(b) (2) (ii) and made factual presumptions which, under the applicable substantive law, were found to provide an alternative ground for dismissal. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corporation*, 50 F.R.D. 13 (E.D. Pa. 1970), Order of April 6, 1970 (No. 19,171); Order of April 29, 1970 (Nos. 19,172, 19,174); Order of April 30, 1970 (No. 19,173).

"We will affirm the dismissals on the basis of the district court's thorough and well-reasoned opinion of April 6, 1970, upon which all three orders are predicated. In the circumstances of these cases, it was within the district court's sound discretion to dismiss the actions of the present appellants solely for inexcusable failure to answer interrogatories." 438 F.2d 1188.

As the court below observed, the *Mangano* case stands for the procedural point that failure to answer interrogatories may result in adverse determination of the issues which are the subject of that discovery.

Here, we do not have a situation where the respondents have failed to make discovery. This is not a case of consumers who have only a minuscule interest in the outcome of the litigation. Rather, the respondents are a large number of public consumers of liquid asphalt who allege that illegal overcharges by the petitioners have resulted in unlawfully high prices to them for millions of tons of asphalt purchased through public contracts. If these respondents are not allowed to recover, the inescapable results will be that the petitioners will be allowed to retain their assumedly illegal profits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgement of the court below is in accord with the decisions of this Court, and that the petition for certiorari should be denied.

Respectfully submitted,

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